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QUESTION PRESENTED

Are the areas of Fort Dix in which the court of appeals upheld exercise of First Amendment rights by civilians "open to the public" pursuant to the standards established in *Flower v. United States*, 407 U.S. 197?

STATEMENT OF THE CASE

The procedural history and facts of the case are fully summarized in the two opinions of the court of appeals (App. B, 10a-13a, 21a-29a; App. H, 48a-50a).[1]

1. "App. [A, B, C, D, E, F, G, or H]" is used herein to refer to appendices A through H attached to the Petition. "App." is used herein to refer to the appendix filed in the court of appeals.

REASONS FOR DENYING THE WRIT

I. The Questions Raised by Petitioners Are Not Presented by This Case, and the Questions That Are Presented by This Case Do Not Merit Granting the Writ.

The essence of Respondents' (plaintiffs below) claim, and the basis on which it was upheld by the court of appeals, is that civilians may exercise First Amendment rights (subject, of course, to reasonable regulation of the time, place, and manner) on the portions of military bases that are "open to the public" pursuant to this Court's decision in *Flower v. United States*, 407 U.S. 197. Plaintiffs did not question, and do not now question, the authority of the military to close any or all of its bases to the public or to prohibit entry as well as exercise of First Amendment rights by civilians on a closed base or a closed portion of a base. Nor did plaintiffs seek, or the court of appeals decide, to broaden the scope of this Court's decision in *Flower*.

Respondents' claim was based, as was this Court's decision in *Flower*, on the general principle that in government controlled areas to which the public is granted free and open access, the Government may not prohibit all First Amendment activities or selectively prohibit such activities based on content. E.g., *Lovell v. Griffin*, 303 U.S. 444; *Schneider v. State*, 308 U.S. 147; *Murdock v. Pennsylvania*, 319 U.S. 105 ("dissemination of views may not be suppressed because they are unpopular, annoying, or distasteful"); *Jamison v. Texas*, 318 U.S. 413, 416 ("[o]ne who is rightfully on a street which the state has left open to the public carries with him there as elsewhere the constitutional right to express his views in an orderly fashion"); *Edwards v. South Carolina*, 372 U.S. 229; *Tinker v. Board of Education*, 393 U.S. 503; *Police Department of Chicago v. Mosley*, 408 U.S. 92, 96 ("once a forum is opened up to assembly or speaking by some groups, the government may not prohibit others from assembling or speaking on the basis of what they say").

Petitioners do not argue that *Flower* is not controlling (they seem to concede that it is controlling, Petition, at 15-17). Nor do they offer any reasonable factual basis for distinguishing *Flower* or ask the Court to reconsider or overrule *Flower*. Rather, Petitioners have framed the issues in a broad, distorted fashion and have thereby sought to convince the Court that there are conflicts between the decision of the court of appeals (and presumably, *Flower*) and recent decisions of this Court.[2] However, there are no such conflicts; most of the issues raised by Petitioners are simply not presented by this case and were not considered or resolved by the court of appeals. We are not here concerned with: (1) a closed, maximum security military installation, as in *Cafeteria and Restaurant Workers Union v. McElroy*, 367 U.S. 886,[3] a decision rendered before *Flower*; (2) a privately owned and controlled area, as in *Lloyd Corp. v. Tanner*, 407 U.S. 551; (3) the duties and First Amendment rights of military personnel, as in *Parker v. Levy*, 417 U.S. 733; (4) the rights of news reporters and prisoners concerning interviews of inmates in closed, guarded prisons, as in *Pell v. Procunier*, 417 U.S. 817 and *Saxbe v. Washington Post*, 417 U.S. 843; or (5) the problem of First Amendment activities directed at a "captive audience," as *Lehman v. City of Shaker Heights*, 418 U.S. 298.[4] The primary, if not only, question presented by this

2. For example, the issues are framed by Petitioners as if Respondents sought and were granted exercise of First Amendment rights on a military base without regard to whether or not the base or a portion thereof is maintained, by military choice, as an open, public area. Their statement of the issues presented does not mention or consider the whole question of the openness of the base,, Petition, at 2, and it is hardly discussed in the remainder of the Petition.

3. This Court described that installation as follows: "Access to it was restricted, and guards were posted at all points of entry. Identification badges were issued to persons authorized to enter . . .;" the installation was working on "weapon systems of a highly classified nature." 367 U.S. at 887. Moreover, that decision concerned the due process rights of a civilian employee.

4. Fort Dix covers 55 square miles in which military and civilian personnel can move unhindered and unrestricted except

case is whether the portions of Fort Dix in which plaintiffs have been granted First Amendment rights are "open to the public" pursuant to *Flower*.

In the following sections, we argue that: (1) the portions of Fort Dix in which plaintiffs were granted First Amendment rights are quite clearly "open" pursuant to *Flower*, as the court of appeals determined based on an extensive, complete record; (2) there is no conflict in the lower courts concerning either the principles upon which *Flower* was based or application of the standards set out therein, and this Court's mandate in *Flower* is being carefully carried out with due regard for military interests and security; (3) Petitioners' other objections which are presented by this case—concerning mainly the potential for disruption and the political neutrality of the military—were considered and resolved by this Court in *Flower*, and, moreover, should be deemed to have been waived.

II. The Decision Below Rests on the Particular Facts of This Case as Determined by the Court of Appeals Based on an Extensive, Complete Record.

The record quite clearly demonstrates that the areas of Fort Dix in which the court of appeals has protected civilian exercise of First Amendment rights are open to the public under the standards set out in *Flower*. Indeed, the evidence presented by plaintiffs—which was unrebutted[5]—shows that Fort Dix is essentially indistinguishable from the surrounding area in New Jersey except that it is controlled by military rather than civilian authorities.

At the initial evidentiary hearing, eight witnesses testified on behalf of the plaintiffs, including two colonels,

Note 4—*Continued*
in certain small areas; of the 28,000 people officially on the base, presumably the audience Petitioners believe is "captive," 150 to 200 people attended plaintiffs' rally held on a small parking lot.

5. Petitioners did not present any testimony but relied on the testimony of two colonels discussed *infra* and on two affidavits by base officials that are in accord with that testimony.

responding to a subpoena of General David or his representative, and a private presently training at the base. The colonels were Jasper R. Johnson, Director of Personnel and Community Activities, and Vincent I. Olsen, Provost Marshal. Except where noted, the references to testimony made in the following discussion are references to the testimony of the two colonels.

Access to Fort Dix is freely open to the public. Except in a few small restricted areas, where First Amendment rights were not claimed (App. 87a), civilians can pass through, visit, tour the base, walk around, ride around, talk to military personnel, eat at the cafeteria—all without being questioned, stopped, or hindered in any way (App. 77a-79a, 69a). The base is crisscrossed by New Jersey state and county roads that are civilian thoroughfares (App. 79a, 97a).[6] Public buses freely enter and leave the base, picking up and leaving civilians, without being monitored or controlled (App. 79a-81a). Military personnel can, in their off-duty time,[7] read books, newspapers, and other periodicals, which are readily available in a library and at stores, watch television (there is one in each barracks), listen to radio, play sports, or just relax (App. 37a-38a, 66a-68a). These materials and media contain partisan and varied viewpoints, including viewpoints opposed to the Indo-China War, and discussion of them is "quite common." (App. 38a, 67a-78a). The *Army Times*, a newspaper generally available on the base, contains partisan material; the October 5, 1972 issue, introduced into

6. Petitioners state that " 'No Trespassing' signs are conspicuously posted" on the roads to distinguish *Flower*. Petition, at 16. Earlier in their Petition, they more accurately discuss these signs: " 'No Trespassing' signs are posted along the one state highway." Petition, at 7. There are ten highways, all of which are open, and there are some "No Trespassing" signs on a portion of one of them (not in the areas where Respondents exercised or sought to exercise First Amendment rights). There are also "Visitors Welcome" signs on some of the main entrances to the base (see Exhibits P-3A through P-11A).

7. They have off-duty time in the evenings and on weekends. It increases as the training period progresses.

evidence below as Exhibit P-7, had a full page ad urging the re-election of President Nixon that Col. Johnson found "very partisan." (App. 43a).

Moreover, civilians are allowed to address various sized gatherings of military personnel and their dependents on a wide variety of topics. Businessmen come to speak to soldiers about business management principles (App. 57a-58a). Up to 500 listen to religious talks at the chapel (App. 58a). People from the surrounding community come in to discuss "emergency preparedness." (App. 59a). Civilians address gatherings of 50 soldiers about drug abuse. (App. 57a, 59a-60a). There are even rock music concerts open to civilians attended by as many as 5,000 people (App. 55a). Civilians visit fairly regularly to convey various types of information. (App. 60a).

The civilian witnesses supplemented the testimony of the colonels with their own experiences on the base. Dina Portnoy, who worked in Wrightstown, New Jersey, went on the base, without being stopped or questioned, about three times a week to the barracks, the cafeteria, etc.[8] (App. 110a-112a). She also regularly used the state and county roads running through the base, including New Jersey Route 68 and Texas Avenue, as thoroughfares to get from Wrightstown to a friend's home in Browns Mills, New Jersey. Sidney Stapleton rode and walked around the base for a few hours on October 5, 1972 (App. 120a-124a). He ate at the cafeteria, bought newspapers (including the issue of the *Army Times* discussed *supra*), and went to barracks. He stopped at one entrance to the base and counted fifty-three non-military vehicles (without decals) going in and out in fifteen minutes; most of the traffic was non-military. A soldier on duty at an information booth gave him information which led him to believe the base is open to access by the public. (App. 124a). Finally, Donald Campbell, a private in training at the base, testified that there is leisure time, during which he read four books in

8. Her civilian co-workers attended movies at the base theatre (App. 1112-112a).

the last three weeks, and that the soldiers have time to hear addresses by candidates. (App. 132a-139a). Furthermore, he testified that during his orientation period at the base, he and the other soldiers were told by their sergeants that the base is open and that it is dangerous at night because so many civilians freely enter the base. (App. 136a).

The further evidence presented at the final hearing, though mainly concerned with the jurisdictional amount issue,[9] made the openness of the base even clearer[10] and included evidence concerning the campaign rally.

Leaflets announcing the rally were distributed throughout the open areas of the base without even a minor incident. (App. 237a-38a). The person in charge of the leafletting described the reception given the leafleteers as "warm" (App. 237a). The rally, held on a Saturday afternoon, was attended by 150 to 200 persons, including about 60 to 75 civilians (App. 237a-38a, 255a). Colonel Olsen was asked if there was "any trouble" at the rally, and he responded, "None that I recall." (App. 257a). The court then asked him if there were any "disturbances," and he testified, "None whatsoever." (App. 258a).

9. Petitioners strenuously argued in the courts below that violation of First Amendment rights could never satisfy the jurisdictional amount requirement in 28 U.S.C. §1331, a position that could have the effect of barring any suits to redress deprivation of First Amendment rights by federal officials. Petitioners' position was rejected in the court of appeals (App. H, 52a-55a), and they have not raised the issue in this Court.

10. Several pictures of the base were introduced showing its openness and similarity to an ordinary community with public roads, civilian traffic, and pedestrians. Exhibits P-1A and P-2A show Respondents Ginaven and Misch handing out booklets on the rights of servicemen just before they were arrested just inside the base. They were on the main road through Wrightstown, New Jersey just past the center of the city. Exhibits P-3A through P-11A show various open areas of the base, including pictures of a shopping center, bowling alley, civilians buying pretzels at a stand, various signs (including "Visitors Welcome"), civilian buses and cars, and visitor parking and information areas.

The court of appeals concluded:

> The record establishes that Fort Dix, a reservation of over fifty-five square miles, is crossed by ten paved roads, including a major state highway, Route 68, on all of which unrestricted vehicular traffic, civilian as well as military, is permitted at all times. . . . Buses, operated as common carriers, use the roads on the base. They pick up and discharge passengers, civilian and military. Civilians are authorized on the post. There are numerous employed civilians. Business concessions are conducted on the post. Civilians are welcome to visit soldiers. Tourists are welcome. Entertainments are occasionally provided at which as many as 5,000 people may congregate at a sports arena on the post. . . . One can visit the post for any reason at all, or no reason at all, except apparently, to campaign for political office or to distribute unapproved leaflets. The gate at which candidates Spock and Pulley were stopped is on the Wrightstown Road, about five feet from the commercial district of Wrightstown. It is normally open and unguarded, but was apparently guarded by representatives of defendant David on September 23, 1972, in anticipation of the visit. A traffic count taken in 1970, the most recent available, disclosed a daily vehicle count of 66,000 vehicles. . . . Fort Dix, when compared to Fort Sam Houston, is *a fortiori* an open post." (App. B, 22a-24a)

II. There Is Absolutely No Conflict Among the Lower Courts Concerning the Appropriateness of the *Flower* Decision or Its Meaning and Application.

There is absolutely no dispute among the lower courts as to the appropriateness of the *Flower* test or its meaning and application. It has been uniformly followed in every district and circuit court presented with the issue, with the result depending on the particular facts of each case. In addition to the instant case, see *United States v. Floyd*, 477 F.2d 217 (10th Cir. 1973); *Burnett v. Tolson*, 474 F.2d 877 (4th Cir. 1973); *CCCO-Western Region v. Fellows*, 359 F.Supp. 644 (N.D. Calif. 1972); *Jenness v. Forbes*, 351 F.Supp. 88 (D.R.I. 1972). See also *McGraw v. Farrow*, 472 F.2d 952 (4th Cir. 1973).

In *Burnett v. Tolson, supra*, the Fourth Circuit found that Fort Bragg is open to the public, with civilians having free access to shopping areas, the post exchange, and motion picture theatre, and that the plaintiffs therefore had a right to "enter the public areas of Fort Bragg as leafleteers." 474 F.2d at 881.

The Tenth Circuit, in *United States v. Floyd, supra*, held that Tinker Air Force Base was "closed" pursuant to the test in *Flower*. Tinker was posted with a large sign which reads as follows:

> "WARNING
> U.S. AIR FORCE BASE
> IT IS UNLAWFUL TO ENTER THIS AREA WITHOUT PERMISSION OF THE COMMANDER TINKER AIR FORCE BASE WHILE ON THIS INSTALLATION ALL PERSONNEL AND THE PROPERTY UNDER THEIR CONTROL ARE SUBJECT TO SEARCH." 477 F.2d at 223

Five security guards were posted at the entry, and a fence surrounded the entire installation.

In *Jenness v. Forbes, supra*, which involves virtually identical facts and many of the same parties as the instant case, the district court distinguished between the portions of the base which were "open to the public," in which plaintiff candidates were allowed to campaign, and "closed" areas, in which plaintiffs' claims were denied. The open areas included portions of the base outside a barbed wire perimeter fence; access was denied to the portion of the base inside the fence, which could only be entered through four gates, all of which were manned by armed sentries charged with permitting only authorized personnel to pass.

On plaintiffs' motion for reconsideration in that case, the district court entered a supplemental opinion holding that plaintiffs must be allowed to campaign on any portion of the base, subject only to reasonable regulation as to time, place, and manner. The earlier decision was modified because the court ruled that the military had waived its objections when, after the court's initial decision, the Department of Defense approved a campaign visit to the base by then Vice-President Spiro Agnew.[11] 351 F.Supp. at 98-100.

The decisions of the lower courts demonstrate an appropriate regard for military interests and security and a clear uniformity and consistency with the decision of the court of appeals in this case and with this Court's mandate in *Flower*.[12]

11. This is discussed further in Point IV, *infra*.

12. Petitioners suggest an interpretation of *Flower* that is not supported in any of the decisions (except the initial decision of the district court in this case, App. A, 7a-8a) and is not merited by the language this Court used. Without negating the presence in this case of the factors set out in *Flower*, Petitioners challenge the court below's application of *Flower* by urging that the term "abandon" in *Flower* be interpreted to mean literal abandonment, i.e., leaving property unattended and uncontrolled with the intent to relinquish all rights with regard to it, and that no base is "open" that is not abandoned in that sense. First, nothing in the *Flower* record even suggests an abandonment in that sense as to Fort Sam Houston. The street where Flower was arrested was part of the base and was so marked. Moreover, the arrests of Flower *by military police* on two occasions (for leafletting) quite clearly indicate that Fort Sam Houston was being patrolled by the military and that the military was exercising control over the base.

In any event, it is clear that the Court did not use "abandon" in that sense. The term was used immediately after the listing of the factors concerning public access, as follows:

> "Under such circumstances [the factors listed] the military has abandoned *any claim that it has special interests in who walks, talks, or leaflets on the avenue.*" 407 U.S. at 198 (emphasis added).

What was "abandoned" was not the property rights of the military but the right of the military to prohibit exercise of First Amendment rights.

IV. Petitioners' Other Objections to the Decision of the Court of Appeals That Are Presented by This Case Were Resolved in *Flower* and, in Any Event, Should Be Deemed to Have Been Waived by the Department of Defense When It Approved a Campaign Visit and Press Conference at the Quonset Naval Base by Major Party Candidates.

Petitioners object to the decision of the court of appeals on a variety of additional grounds that boil down to two basic concerns: that leafletting and campaigning by civilians on even an open base might (1) compromise the "political neutrality" of the military and (2) interfere with the military mission. Both of these concerns formed the basis of the decision by the Fifth Circuit in *Flower*, which was reversed by this Court.[13]

Allowing various views to be expressed and heard does not constitute support of those views or a violation of political neutrality. If Petitioners' view of neutrality were accepted, then federal, state, and local authorities would be considered partisan every time they allowed anyone to exercise any First Amendment rights. To the contrary, neutrality—which Respondents wholeheartedly support—means allowing issues to be aired and conflicting views on them to be expressed.

Moreover, if allowing the views of political candidates, or others, to be heard constitutes a violation of neutrality, then it had already been violated at Fort Dix by Petitioners' allowing wide and open distribution of *some* partisan

13. The majority in the Fifth Circuit held that the Fort Sam Houston regulations prohibiting First Amendment activities, which are almost identical to the Fort Dix regulations, were "reasonable" to "maintain order and discipline," 452 F.2d at 85, and to prevent interference with the "military mission," *id.* at 86. Moreover, that majority said:

> ". . . on base distribution of materials through unauthorized distribution outlets could wrongfully imply that their contents had been approved and were expression of Army policy." *Id.* at 85.

materials and views. The unrebutted evidence showed that television, radio, magazine and newspaper coverage of the partisan views and activities of the major party candidates was widely and openly available to military personnel and civilians on the base, including the materials in *Army Times* discussed *supra*. It is untenable—and impermissible—for military authorities to raise "neutrality" as a bar to airing minority views when in fact they assist in publicizing the views of majority party candidates. Such discrimination against minority parties and candidates for political office violates rights this Court has determined to be "among our most precious freedoms." *Williams v. Rhodes*, 393 U.S. 23, 30. See also *Mills v. Alabama*, 384 U.S. 214, 218-19; *Dunn v. Blumstein*, 405 U.S. 330; *Sweezy v. New Hampshire*, 354 U.S. 234, 250-51. The court of appeals in this case said:

> "The record discloses that the military permits the circulation and distribution in Fort Dix of a wide range of newspapers and magazines, and that radios and televisions are available during off-duty hours. Thus the persons living in Fort Dix are exposed to the political ideas of those candidates whose campaigns are prominent enough or well-financed enough to attract widespread media coverage. In these circumstances the antisepsis of Fort Dix Regulations Nos. 210-26 and 210-27 is hardly a neutral antisepsis. What the Fort Dix voters are protected from, practically speaking, is exposure to the political ideas of those minor candidates whose campaigns are neither prominent enough nor sufficiently well-financed to attract media coverage, and who must make do with the more old fashioned face-to-face style of campaigning. Such a feigned neutrality serves no discernable military purpose, and cannot outweigh the first amendment rights of the minor candidates." (App. B, 28a-29a).

The claim that exercise of First Amendment rights by civilians would interfere with the military mission seems to involve two kinds of interference. First, Petitioners seem

to say it could "interfere" because Respondents' views are contrary to theirs concerning the War in Indo-China, because of the content of Respondents' speech and leaflets (App. 57a, 72a-73a, 82a-83a, 93a-94a). For example, Colonel Johnson was asked:

> ". . . isn't it true that the content of what a proposed visitor intends to say is the basis for whether he is allowed to come on or not? If, for instance, he says, 'I intend to urge the soldiers not to use drugs,' that, from what you have said, would be something that the Base might favorably look on. If he is going to inform them of some management principle that they are not aware of—
>
> A. That would further our mission, yes.
> Q. But if they are to speak against the war in Vietnam—
> A. That certainly wouldn't forward our mission, would it?
> Q. So the content of what they are to say, that is the basis of whether or not they are approved?
> A. Yes, to a great extent." (App. 73a).

Similarly, newspapers (App. 93a-94a) and leaflets (App. 82a-83a) are approved or disapproved on the base according to their content. Col. Olsen testified that a newspaper not on the "approved" list has to be submitted for approval before it can be sold at base stores (App. 93a-94a). "If it's a paper that is wrong," it will not be approved (App. 94a).

The other kind of "interference" involves possible disruption. (App. 38a, 44a, 46a, 49a). Since the concern here is with areas that the military has decided will be maintained essentially like civilian areas. Petitioners really object not only to Respondents' claims but also to the whole idea of freedom of speech, to the First Amendment. The First Amendment constitutionalizes the judgment that speech is worth its "price" and the wisdom that more disruption results from the suppression of dissent than from

its airing. In any event, disruption can be minimized—as it is by federal, state, and local authorities throughout the country—by reasonable regulation of the time, place, and manner of exercise of First Amendment rights. And Petitioners are very willing to tolerate far greater disruptions, like a rock concert with 5,000 civilians and military personnel attending, for purposes of which they "approve."[14]

Neither the alleged neutrality of the military nor the fear of disruptions seems, under this set of facts, to be genuine. But even if these were genuine considerations, they would hardly amount to a permissible basis for the kind of discrimination and prohibition of First Amendment activities practiced by Petitioners.

Finally, we believe, as the court held in *Jenness v. Forbes, supra,* that Petitioners should be deemed to have waived these objections. After an extended litigation in *Jenness* concerning exercise of First Amendment rights by civilians (many of whom are Respondents in this case) on Quonset Naval Base, the court determined that one portion of the base, located outside of a wire fence, was open and that the civilian plaintiffs could therefore exercise First Amendment rights there but not on the rest of the base. Only three days after the court's decision, the base commander, with the approval of the Department of Defense, allowed then Vice-President Agnew and the Republican candidates for senator, governor, and attorney general of Rhode Island to make a campaign appearance attended by military personnel and hold a news conference on the base. A request by the Vice-President's staff that the press be allowed on the base for the event was honored. Vice-President Agnew's statements, including criticisms

14. Petitioners raise a related question concerning the possibility that military personnel may attend speeches in uniform in violation of military regulations. If military personnel violate valid military regulations concerning speeches or any other activity, the military has the power and ample means to discipline them. This is hardly a basis for prohibiting speeches.

of the Democratic candidate for vice-president and a former Democratic attorney general, were fully covered and reported in the press.

The district court drew the following conclusions from these events, conclusions which we believe apply as well in the instant case:

> "This incident constitutes a waiver of the argument that a significant security interest supports the prohibition on political speech. The Commander felt that there was no threat to the security of the base in allowing entry to four Republican candidates. It must follow that there is no security threat in allowing entry to two minority party candidates and their workers.
>
> • • •
>
> "The Agnew visit poignantly emphasizes the validity of plaintiffs' argument that they, as minority party members, are denied access to channels of communication available to the two major parties, richer in resources of wealth, connections, and prestige. They must, plaintiffs argue, rely on face to face campaigning. Yet defendants would deny them even this morsel of campaign techniques, while making it available to major party candidates who need it less. The First Amendment does not allow the hypocrisy of defendants' 'political neutrality.'
>
> • • •
>
> "There are no constitutionally permissible distinctions that may be drawn between plaintiffs and the Republican candidates that would justify this discrimination against plaintiffs. It is impermissible to base the discrimination on their minority group status. Williams v. Rhodes, *supra*. It is impermissible to base the discrimination on the presumed content of their speech. Police Department of the City of

Chicago v. Mosley, 408 U.S. 92, 92 S. Ct. 2286, 33 L.Ed. 2d 212 (1972).

* * *

". . . Any meaningful military interest in enforcing the prohibition against plaintiffs has either been waived or, in reality, just does not exist." 351 F. Supp. at 100-101.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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